

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRAYVON R. CAIL,

Petitioner,

v.

DONALD R. HOLBROOK,

Respondent.

CASE NO. C22-00031-LK

ORDER GRANTING MOTION
FOR EXTENSION AND
REQUESTING SUPPLEMENTAL
BRIEFING

This matter comes before the Court on the Report and Recommendation of United States Magistrate Judge David W. Christel, Dkt. No. 9, the objections thereto filed by pro se Petitioner Trayvon Cail, Dkt. No. 10, and Mr. Cail's motion for an extension, Dkt. No. 11. Having reviewed the Report and Recommendation, Mr. Cail's objections and motion for an extension, and the balance of the record, the Court grants the motion for an extension and requests supplemental briefing as set forth below.

I. BACKGROUND

The background facts and procedural history are set forth in the Report and Recommendation and are adopted here. Dkt. No. 9 at 1–2. Mr. Cail, who is currently incarcerated

1 following his state court conviction, filed a petition for writ of habeas corpus under 28 U.S.C.
2 § 2254 on December 30, 2021. Dkt. No. 3. In response to the question on the habeas form “explain
3 why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your
4 petition,” Mr. Cail wrote, “Post-conviction review ended on December 1, 2021, so this petition is
5 timely under 28 U.S.C. section 2244(d)(2).” Dkt. No. 3 at 13.

6 **A. The Report and Recommendation**

7 Judge Christel recommended dismissal of the petition because it was filed after expiration
8 of the one-year statute of limitations under the federal Antiterrorism and Effective Death Penalty
9 Act of 1996 (“AEDPA”). Dkt. No. 9 at 3–5. The statute of limitations ran on May 23, 2019, one
10 year after Mr. Cail’s judgment of conviction became final. *Id.* at 4. Judge Christel explained that
11 although the statute of limitations is subject to statutory tolling while a properly filed personal
12 restraint petition is pending, the personal restraint petition that Mr. Cail filed on July 17, 2019 did
13 not toll the statute of limitations because it was filed after the one-year limitations period expired.
14 *Id.* at 4 (citing *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)). Judge Christel explained
15 that the statute of limitations is also subject to equitable tolling, but Mr. Cail did not argue that he
16 was entitled to equitable tolling or demonstrate that extraordinary circumstances prevented him
17 from filing a timely habeas petition. *Id.* at 5. Because Mr. Cail’s petition was untimely, Judge
18 Christel recommended its dismissal with prejudice. *Id.* at 6.

19 **B. Objections and Motion for an Extension**

20 Mr. Cail filed objections to the Report and Recommendation. Dkt. No. 10. While he does
21 not dispute that statutory tolling does not save his petition from being untimely, he now argues
22 that he is entitled to equitable tolling. *Id.* at 1. Mr. Cail argues that he pursued his rights diligently
23 by “seeking counsel to represent [him] on appeal.” *Id.* He contends that his counsel “has a duty to
24 represent [him] in a timely manner and notify [him] of any due dates,” and that he was time-barred

1 “d[ue] to [his attorney] John Henry Browne [not] disclos[ing] information of notices in time and
2 fail[ing] to timely file a response[.] *Id.* (“Atto[rn]ey received all notices from the courts and failed
3 to disclose[]/inform me of notices”).

4 After filing his objections, Mr. Cail filed a motion for an extension asking the Court to
5 delay issuing a ruling on the Report and Recommendation to allow him to file a declaration from
6 Mr. Browne. Dkt. No. 11 at 1–2. The Court construes the motion as a request for an extension of
7 time to file objections (including supporting documents) to the Report and Recommendation. In
8 his motion, Mr. Cail explained that the declaration will “explain that the ____ [sic] was a result of
9 miscalculation on the part of petitioner’s former legal counsel, and should not prevent Petitioner
10 from requesting a pro se writ of habeas corpus.” *Id.* at 2–3. Respondent did not file a response to
11 the motion, which the Court construes as an admission that it has merit. LCR 7(b)(2). The Court
12 finds good cause to grant the unopposed motion for an extension so it can consider the declaration,
13 and it grants Mr. Cail’s motion for an extension. Dkt. No. 11.

14 The declaration Mr. Cail submitted from Mr. Browne states, “I and my law office
15 represented Petitioner Trayvon R. Cail in his sentencing and direct appeal. After the Court of
16 Appeals affirmed his conviction, we also prepared Mr. Cail’s Personal Restraint Petition (PRP).”
17 Dkt. No. 11 at 4. He further states that the attorney in his office who was primarily responsible for
18 the PRP delayed filing it to find and interview relevant parties, and as a result, the PRP was not
19 filed until July 17, 2019. *Id.* Mr. Browne states that his office’s delay in filing the PRP “meant that
20 the statute of limitations for seeking [federal habeas] relief had already expired on May 23, 2019,”
21 but “[o]ur office failed to recognize this fact or to notify Mr. Cail that he would be time-barred
22 from seeking habeas relief in the future.” Dkt. No. 11 at 4; *id.* at 5 (“The delay in our office’s filing
23 of Mr. Cail’s [PRP] prejudiced his opportunity to seek federal review as a *pro se* petitioner.”).

II. DISCUSSION

There is no dispute that unless equitable tolling applies, Mr. Cail’s habeas petition is barred by AEDPA’s one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). However, because AEDPA’s limitations period is not a jurisdictional bar, it may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645 (2010). A petitioner bears the burden of showing that this “extraordinary” remedy should apply to him. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

A petitioner is entitled to equitable tolling only if he shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Included within those factors is a causation component that requires courts to evaluate the petitioner’s diligence “in all time periods,” including after he is “free from the extraordinary circumstance,” to determine “whether the extraordinary circumstance actually did prevent timely filing.” *Smith v. Davis*, 953 F.3d 582, 595, 599 (9th Cir. 2020) (en banc). “[I]t is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy.” *Id.* at 600. “To be clear, this rule does not impose a rigid ‘impossibility’ standard on litigants, and especially not on pro se prisoner litigants—who have already faced an unusual obstacle beyond their control during the AEDPA limitation period.” *Id.* (cleaned up). Instead of applying rigid standards or mechanical rules, courts must decide whether extraordinary circumstances stood in a petitioner’s way and prevented timely filing “based on all the circumstances of the case before it.” *Id.*

Attempting to demonstrate extraordinary circumstances, Mr. Cail alleges that his petition should not be denied due to his former counsel’s “miscalculation.” Dkt. No. 11 at 2. Attorney miscalculations leading to missed deadlines and other “garden variety” claims of negligence or

excusable neglect are not extraordinary circumstances warranting equitable tolling. *Holland*, 560 U.S. at 652. And although Mr. Cail filed his habeas petition pro se, his pro se status and potential ignorance of the law are not extraordinary circumstances warranting equitable tolling either. *See, e.g., Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). However, more egregious attorney misconduct or attorney abandonment may constitute extraordinary circumstances warranting tolling. *Holland*, 560 U.S. at 651; *Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Gibbs v. Legrand*, 767 F.3d 879, 885 (9th Cir. 2014). In this case, Mr. Cail alleges more than just a mistake by his former counsel; he also alleges that his former attorney failed to notify him of due dates or to disclose “notices in time.” Dkt. No. 10 at 1. Mr. Cail does not explain what those due dates and notices were or how his former counsel’s alleged failures in those regards resulted in his petition “being time barred.” *Id.* While in some circumstances the failure to receive timely case status information could impact a petitioner’s ability to file a timely habeas petition, *Gibbs*, 767 F.3d at 886, the record contains insufficient information for the Court to determine whether that is the case here. It is also unclear based on the record before the Court whether Mr. Browne was retained or otherwise agreed to represent Mr. Cail in his federal habeas proceedings or if Mr. Cail believed Mr. Browne represented him for that purpose.

The record is also insufficient for the Court to determine whether Mr. Cail has pursued his rights diligently. “The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.” *Holland*, 560 U.S. at 653 (cleaned up). Mr. Cail alleges that he pursued his “right diligently by seeking counsel to represent [him] on appeal,” Dkt. No. 10 at 1, but the Ninth Circuit has clarified that a petitioner “must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court.” *Smith*, 953 F.3d at 598–99. There is no information in the record regarding what additional

1 steps, if any, Mr. Cail took to preserve his rights other than hiring counsel to represent him in his
2 state court appeal.

3 In light of those deficiencies in the record and because Mr. Cail is proceeding pro se, the
4 Court gives him another opportunity to present facts to support his request for equitable tolling.
5 The Court requests supplemental briefing from Mr. Cail describing:

6 (1) whether Mr. Cail believed that Mr. Browne represented him for purposes of filing his
7 federal habeas petition and if so, the basis for that belief and when he learned that Mr.
8 Browne did not represent him for that purpose;

9 (2) whether Mr. Cail expected to receive notices from Mr. Browne or his office regarding
10 developments in his state court proceedings and if so, the basis for Mr. Cail's expectation
11 and how and when he expected to receive such notices;

12 (3) the "notices" Mr. Cail claims Mr. Browne did not send him, Dkt. No. 10 at 1, including
13 a description of what the notices were and when and how Mr. Cail received them;

14 (4) when and how Mr. Cail learned that the state court of appeals affirmed his conviction
15 by order dated April 23, 2018;

16 (5) when and how Mr. Cail learned of the "miscalculation on the part of [his] former legal
17 counsel," Dkt. No. 11 at 2;

18 (6) what Mr. Cail means specifically in his objections stating that Mr. Browne "failed to
19 file a timely response" and failed to notify him of "due dates," Dkt. No. 10 at 1;

20 (7) the basis for Mr. Cail's belief that he was filing his federal habeas petition on time; and

21 (8) all efforts Mr. Cail made, up to the time he filed his habeas petition in federal court, to
22 file a timely federal habeas petition.

23 Mr. Cail's memorandum must be no more than 30 pages in length.

24 **III. CONCLUSION**

For the foregoing reasons, the Court GRANTS Mr. Cail's motion for an extension, Dkt.
No. 11, DEFERS ruling on his objections, Dkt. No. 10, and ORDERS Mr. Cail to submit, within
30 days of this order, supplemental briefing as described above. Respondent may, but is not
required to, file a response of no more than 12 pages to Mr. Cail's supplemental memorandum

1 within 14 days after receiving it.

2 The Clerk is directed to send uncertified copies of this Order to Mr. Cail at his last known
3 address and to renote Petitioner's Objections, Dkt. No. 10, for December 29, 2022.

4 Dated this 29th day of November, 2022.

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6 Lauren King
7 United States District Judge
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